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THE DEMISE OF THE LIABILITY LIMITATIONS OF THE WARSAW CONVENTION—AN UNNECESSARY FATALITY: *FRANKLIN MINT CORP. V.* *TRANS WORLD AIRLINES, INC.*

The paramount purpose of the Warsaw Convention (the Convention)¹ was to foster the development of a nascent aviation industry by limiting the extent of an airline's liability for accidents occurring during the course of an international flight.² Expressing

¹ Warsaw Convention, opened for signature Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 [hereinafter cited as Warsaw Convention].

² *Reed v. Wiser*, 555 F.2d 1079, 1089 (2d Cir.), cert. denied, 434 U.S. 922 (1977); Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 499 (1967); see *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 327 (5th Cir. 1967). The expressed purposes of the Warsaw Convention were to create uniformity in air carriers' liability as well as to provide for consistency in air transport documentation. Warsaw Convention, *supra* note 1, preamble, 49 Stat. 3014, T.S. No. 876, at 16, 137 L.N.T.S. 15; see Lowenfeld & Mendelsohn, *supra*, at 498-99. The liability limitation was considered the more important of the two purposes since without limited liability, insurance costs would be prohibitive and the newborn aviation industry would be unable to attract investors. Lowenfeld & Mendelsohn, *supra*, at 499-500.

The Convention was enacted in 1929, *id.* at 498, although the United States did not declare its adherence until 1934, Warsaw Convention, *supra* note 1, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11. The Convention applies only to international commercial air transportation of persons, baggage or cargo. Warsaw Convention, *supra* note 1, art. 1(1), 49 Stat. 3014, T.S. No. 876, at 17, 137 L.N.T.S. 15. "International transportation" refers to a flight that, according to the contract of carriage, is between two member states or a flight within one member state "if there is an agreed stopping place within a territory . . . of another power, even though that power is not a party to [the Warsaw] convention." *Id.* art. 1(2), 49 Stat. 3014, T.S. No. 876, at 16-17, 137 L.N.T.S. 15; see Lowenfeld & Mendelsohn, *supra*, at 501. There is a presumption of liability against the air carrier in the case of personal injuries or death, Warsaw Convention, *supra* note 1, art. 17, 49 Stat. 3018, T.S. No. 876, at 21, 137 L.N.T.S. 23, which is rebutted: (1) upon proof that the carrier took "all necessary measures to avoid the damage or that it was impossible for [it] to take such measures," *id.* art. 20(1), 49 Stat. 3019, T.S. No. 876, at 22, 137 L.N.T.S. 25, and (2) to the extent that a particular jurisdiction recognizes the affirmative defense of contributory negligence by the passenger, *id.* art. 21, 49 Stat. 3019, T.S. No. 876, at 22, 137 L.N.T.S. 25. An airline will be relieved of liability for loss of baggage or cargo if it can prove that the "damage was occasioned by an error in piloting, in the handling of the aircraft, or in the navigation and that, in all other respects, [the airline has] taken all necessary measures to avoid the damage." *Id.* art. 20(2), 49 Stat. 3019, T.S. No. 876, at 22, 137 L.N.T.S. 25. An airline will not be accorded the Convention's limitations of liability if the airline or its agent is guilty of wilful misconduct. *Id.* art. 25(1), 49 Stat. 3020, T.S. No. 876, at 23, 137 L.N.T.S. 27. The ceiling limit of a

the maximum recoverable amount in terms of a specified number of Poincaré francs,³ the member nations sought to create a uniform limitation on liability, the gold value of which could be readily con-

passenger's recovery is limited to 125,000 gold francs for personal injuries or death and 250 francs per kilogram of damaged or lost goods. *Id.* art. 22(1), (2), 49 Stat. 3019, T.S. No. 876, at 22, 137 L.N.T.S. 25. The sums can be converted into the passenger's domestic currency. *Id.* art. 22(4), 49 Stat. 3019, T.S. No. 876, at 22, 137 L.N.T.S. 25; see *infra* notes 3-4. Additionally, provisions that would fix a lower limit of liability or relieve the carrier of liability entirely are declared by the Convention to be void. Warsaw Convention, *supra* note 1, art. 23, 49 Stat. 3020, T.S. No. 876, at 22, 137 L.N.T.S. 27. There is a 2-year statute of limitations governing actions against airlines, which begins to run from the date of arrival at the point of destination, or from the purported date of arrival, or from the date transportation ceased. *Id.* art. 29, 49 Stat. 3021, T.S. No. 876, at 23, 137 L.N.T.S. 29.

³ Article 22 of the Convention provides in part:

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. . . . Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

. . . .

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Warsaw Convention, *supra* note 1, art. 22(1), (2), (4), 49 Stat. 3019, T.S. No. 876, at 22, 137 L.N.T.S. 25.

Article 22 refers to the French gold franc, or "Poincaré" franc, named after the French prime minister under whose administration the gold value of the franc was set at 65½ milligrams of gold at the standard of millesimal fineness of 900. Asser, *Golden Limitations of Liability in International Transport Conventions and the Currency Crisis*, 5 J. MAR. L. & COM. 645, 645 (1974). The Poincaré franc was in existence only from 1928 to 1936. See A. LOWENFELD, *AVIATION LAW* § 6.5, at 7-168 (1981).

At the time the Convention was enacted in 1929, national currencies were easily converted to gold because gold possessed an official rate of exchange. Civil Aeronautics Board Internal Memorandum, Warsaw Convention Liability Limits 3 (May 20, 1981) [hereinafter cited as CAB Memorandum, May 20, 1981]; see *infra* note 4. Gold was used as the referent of maximum liability, rather than any particular national currency, in order to avoid any fluctuations in value caused by unilateral government action. See *Boehringer Mannheim Diagnostics, Inc. v. Pan Am. World Airways, Inc.*, 531 F. Supp. 344, 350 (S.D. Tex. 1981); Civil Aeronautics Board Internal Memorandum, Warsaw Convention Liability Limits 6 (Mar. 18, 1980) [hereinafter cited as CAB Memorandum, Mar. 18, 1980]; H. DRON, *LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW* 183 (1954); Asser, *supra*, at 664; Heller, *The Value of the Gold Franc—A Different Point of View*, 6 J. MAR. L. & COM. 73, 91 (1974). Linking an airline's limits on liability to a uniform standard effectuated the Convention's overall purpose of protecting the infant aviation industry. See generally *supra* note 2.

verted into any national currency.⁴ For more than 40 years, the conversion of judgments based upon the official price of gold posed no serious problems for the Convention's member States.⁵ Confusion ensued, however, in 1978, when, by international agreement,⁶

⁴ Warsaw Convention, *supra* note 1, art. 22(4), 49 Stat. 3019, T.S. No. 876, at 22, 137 L.N.T.S. 25. Under article 22(2) of the Convention, a plaintiff would be limited to 250 gold francs per kilogram of lost or damaged goods. If, for example, a plaintiff brought suit under the Convention for damage to cargo, his recovery in United States currency would be limited to the dollar value of 65½ milligrams of gold multiplied by 250 for each kilogram (2.2 lbs.) of cargo damaged.

⁵ *Boehringer Mannheim Diagnostics, Inc., v. Pan Am. World Airways, Inc.*, 531 F. Supp. 344, 350 (S.D. Tex. 1981); H. DRION, *supra* note 3, at 183; Asser, *supra* note 3, at 664; Heller, *supra* note 3, at 95. When the Convention was enacted in 1929, the value of gold was approximately \$20 per ounce. 531 F. Supp. at 350. In 1934, when the United States ratified the Convention, *see supra* note 3, the dollar was devalued to an official price of \$35 an ounce. *See* Gold Reserve Act of 1934, Pub. L. No. 73-87, § 2, 48 Stat. 337 (1934) (codified at 12 U.S.C. § 467 (1976)). This official United States gold value served as an official currency for international transactions due to the comparative financial strength of the United States. R. CARBAUGH & L. FAN, *THE INTERNATIONAL MONETARY SYSTEM* 63-64 (1976). In 1945, the United States became a party to the International Monetary Fund (IMF), Bretton Woods Agreements Act, ch. 339, § 2, 59 Stat. 512 (1945) (codified at 22 U.S.C. § 286 (1976)), which created an international currency exchange that was based on assigned par values for each nation's currency, Heller, *supra* note 3, at 79-80. Each member of the IMF was to express the par value of its currency in terms of gold or in terms of the United States dollar. R. SOLOMON, *THE INTERNATIONAL MONETARY SYSTEM: 1945-1976* 12 (1977); Gold, *Gold in International Monetary Law: Change, Uncertainty, and Ambiguity*, 15 J. INT'L L. & ECON. 323, 326-27 (1981); Heller, *supra* note 3, at 79-80. The United States, according to the Bretton Woods Agreements Act, promised to maintain the par value of the dollar at .888671 grams of fine gold. Gold, *supra*, at 326. Under this international monetary system, therefore, the establishment of gold as an international common denominator "resulted in a precise relationship, called parity, between each two currencies and a consistent network of parities among all currencies." *Id.* at 327. Since the IMF was composed of some 45 countries in 1944, Heller, *supra* note 3, at 79, translation of judgments into domestic currencies based on the Convention's "gold clause" (article 22(4)) was not problematical, *see Boehringer*, 531 F. Supp. at 350. A. LOWENFELD, *supra* note 3, § 6.5, at 7-168 to -69. An official price of gold existed internationally for approximately 40 years, *Boehringer*, 531 F. Supp. at 351, until the IMF abandoned the requirement that gold be kept at a uniform value, *see infra* notes 6-7 and accompanying text.

⁶ Bretton Woods Agreement, Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. No. 1501, 2 U.N.T.S. 39 (1945) (amended 1969, 1978); *see Boehringer*, 531 F. Supp. at 351; Asser, *supra* note 3, at 651. The United States dollar suffered a series of devaluations during the 1970's due to immense deficits. Asser, *supra* note 3, at 651. In 1971, President Nixon suspended the United States obligation under the Bretton Woods Agreements Act to convert gold into dollars. A. LOWENFELD, *supra* note 3, § 6.5, at 7-169. The dollar was devalued in 1971 to \$38 per ounce, Par Value Modification Act, Pub. L. No. 92-268, § 2, 86 Stat. 116 (1972), and again in 1973 to \$42.22 per ounce, Par Value Modification Act, Pub. L. No. 93-110, § 1, 87 Stat. 352 (1973), *repealed by* Act of Oct. 19, 1976, Pub. L. No. 94-564, § 6, 90 Stat. 2660 (1976). In response to the dollar's devaluations, the IMF enacted amendments to the Bretton Woods Agreements Act. First, the Special Drawing Right (SDR) was established to replace the dollar as the IMF's standard of account. Amendment of Articles of Agreement of the International Monetary Fund, July 28, 1969, 20 U.S.T. 2775, T.I.A.S. No. 6748, 726

the official gold price was eliminated in favor of the fluctuating free market price. Since that time, courts have been confronted with the question whether the last official price of gold or its fluctuating free market price⁷ should serve as the basis of conversion under the Convention.⁸ Compounding this confusion was the suggestion from several spheres that the judiciary adopt a limitation based upon a unit of account other than the Poincaré franc.⁹ Recently, in *Franklin Mint Corp. v. Trans World Airlines, Inc.*,¹⁰ the Court of Appeals for the Second Circuit held that the elimination of the

U.N.T.S. 266. The SDR's value was set at .888671 gram of fine gold. *Id.* art. XXI, § 2, 20 U.S.T. 2781, T.I.A.S. No. 6748, 726 U.N.T.S. 280; see Gold, *supra* note 5, at 344-47. A second IMF amendment to the Bretton Woods Agreements Act came in 1976, and eliminated the obligation of IMF members to use gold as a common denominator for currency values, and also eliminated gold as the basis of the SDR. Second Amendment to the International Monetary Fund Articles of Agreement, April 30, 1976, art. VIII, § 7, art. XXII, 29 U.S.T. 2203, T.I.A.S. No. 8937; see Gold, *supra* note 5, at 351-53. The United States ratified the IMF's second amendment and repealed the Par Value Modification Act of 1973, which had set the official value of gold at \$42.22 per ounce. Act of Oct. 19, 1976, Pub. L. No. 94-564, 90 Stat. 2660. Thus, after April 1, 1978, with the repeal of the Par Value Modification Act of 1973, there no longer existed any fixed relationship between gold and the dollar. See CAB Memorandum, March 18, 1980, *supra* note 3, at 3. The SDR, no longer tied to gold, was based on a basket of 16 currencies which, in turn, was reduced to five currencies in 1981. See Ward, *The SDR in Transport Liability Conventions: Some Clarification*, 13 J. MAR. L. & COM. 1, 3 (1981).

⁷ With the repeal of the Par Value Modification Act, which itself had become effective April 1, 1978, the price of gold, having no official value, was subject to the vacillations of the open market. See A. LOWENFELD, *supra* note 3, § 6.5, at 7-169; Asser, *supra* note 3, at 646; Heller, *supra* note 3, at 103.

⁸ Compare *Boehringer Mannheim Diagnostics, Inc. v. Pan Am. World Airways, Inc.*, 531 F. Supp. 344, 349 (S.D. Tex. 1981) (current free market price of gold employed by court as standard of conversion) with *In re Air Crash Disaster at Warsaw, Poland*, 535 F. Supp. 833, 842 (E.D.N.Y. 1982) (last official price of gold selected as unit of conversion).

⁹ See *In re Air Crash Disaster*, 535 F. Supp. at 839-41 (defendant aircraft owner advocating use of the SDR or the current French franc as the basic unit of account); Martin, *The Price of Gold and the Warsaw Convention III*, 6 AIR LAW 246, 249 (1981) (advocating adoption of the SDR). It is necessary at this point to outline the differences between a unit of conversion and a standard of liability limitation. Although each represents a distinct concept, these terms often are used interchangeably. See, e.g., *In re Air Crash Disaster*, 535 F. Supp. 833, 840 (E.D.N.Y. 1982). The last official price of gold and the free market price of gold are units of conversion. They each serve the function of converting Poincaré francs into different national currencies. As such, they are used in conjunction with the existing standard of liability under the Convention. See *supra* note 3. On the other hand, the French paper franc and the SDR are separate units of account, similar in this respect to the Poincaré franc, which are designed to form the basis of a standard of limitation that would replace the Poincaré standard embodied in the Convention. See *infra* notes 89-93. Accordingly, neither the French franc nor the SDR can be used to convert Poincaré francs into other national currencies. Rather, each is to be incorporated into its own standard of liability limitation, in lieu of the Poincaré standard.

¹⁰ 690 F.2d 303 (2d Cir. 1982).

official price of gold rendered the Convention's limitation on liability for cargo loss or damage prospectively unenforceable in federal courts,¹¹ and concluded that it was beyond the scope of judicial authority to select an alternative unit of conversion.¹²

In *Franklin Mint*, the plaintiffs¹³ filed suit in federal district court against Trans World Airlines, Inc. (TWA) after valuable coins, to be transported by TWA from Philadelphia to London,¹⁴ were either lost or destroyed.¹⁵ Assessing its damages at \$250,000, Franklin argued that the limitation on liability contained in article 22 of the Convention should be calculated in United States dollars by reference to the present free market price of gold.¹⁶ TWA conceded liability under the terms of the Convention,¹⁷ but contended that its liability under article 22 should be converted into domestic currency by employing any one of three standards: the last official price of gold in the United States, the present exchange value of the French franc, or the Special Drawing Right (SDR) used by the International Monetary Fund (IMF).¹⁸ Deeming TWA's argument for adopting the SDR standard "most persuasive,"¹⁹ the district court nevertheless concluded that the weight of authority dictated employment of the last official price of gold as the appropriate unit of conversion.²⁰ The court reasoned that the Civil Aeronautics Board's (CAB) selection of the last official price of gold as the ap-

¹¹ *Id.* at 304.

¹² *See id.* at 311.

¹³ The plaintiffs included Franklin Mint Corporation, Franklin Mint, Ltd., and McGregor, Swire Air Services Ltd. *Id.* at 304.

¹⁴ *Franklin Mint Corp. v. Trans World Airlines, Inc.*, 525 F. Supp. 1288, 1288 (S.D.N.Y. 1981), *aff'd*, 690 F.2d 303 (2d Cir. 1982). The TWA flight at issue in *Franklin Mint*, from Philadelphia to London, was governed by the Convention because it involved "international transportation" within the meaning of article 1 of the Convention. *See supra* note 2.

¹⁵ 690 F.2d at 304. The court did not ascertain whether the goods were lost or actually destroyed. *Id.* Under the Convention, however, such a determination is unnecessary since liability is imposed for loss, damage or destruction of cargo. *See Warsaw Convention, supra* note 1, art. 18(1), 49 Stat. 3019, T.S. No. 876, at 21, 137 L.N.T.S. 23; *supra* note 2.

¹⁶ 525 F. Supp. at 1289. No special declaration of the value of the goods was made by Franklin at the time of delivery. *Id.* at 1288. If Franklin had made such a declaration, TWA's liability would have been limited, pursuant to the Convention, to the specified amount, unless it could prove that the declared value of the goods was greater than the actual value of the goods to Franklin. *See Warsaw Convention, supra* note 1, art. 22(2), 49 Stat. 3019, T.S. No. 876, at 22, 137 L.N.T.S. 25.

¹⁷ 525 F. Supp. at 1289.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

plicable standard,²¹ coupled with domestic carriers' use of that standard to determine the dollar value of liability printed on their tariffs,²² manifested the parties' intention to adopt the last official price of gold as the proper unit of conversion.²³

On appeal, the Second Circuit affirmed, but held that all causes of action arising 60 days after the *Franklin Mint* decision would no longer be subject to the ceiling of liability imposed by article 22 of the Convention.²⁴ This conclusion was premised upon the court's belief that "devastating argument[s]" militated against each of the four standards of liability limitation proposed by the litigants.²⁵ The court reasoned that the use of the last official price of gold would be illogical since this value had been repealed by a specific act of Congress.²⁶ Furthermore, both the free market price of gold and the current value of the French franc are inappropriate units of conversion, according to the court, because their fluctuat-

²¹ *Id.*; see CAB Memorandum, May 20, 1981, *supra* note 3, at 6; *infra* note 72 and accompanying text.

²² 525 F. Supp. at 1289. Tariffs are public documents that set forth the carrier's services and the regulations and practices relating to those services. See *International Tel. & Tel. Corp. v. United Tel. Co.*, 433 F. Supp. 352, 357 n.4 (M.D. Fla. 1975), *aff'd per curiam*, 550 F.2d 287 (5th Cir. 1977).

²³ 525 F. Supp. at 1289. Presumably, the district court was referring to the CAB and all domestic carriers when it stated that "the parties intended to adopt the last official price of gold as the basis for converting the article 22 limitation into dollars" *Id.* The court did not explain, however, why any weight should be accorded the practices of domestic carriers. It is suggested that the standard of conversion used by air carriers to compute their own liability in terms of a particular national currency is irrelevant to a judicial determination since the carriers were not signatories to the Warsaw Convention. The practices of signatories to a treaty, however, may be considered by a court as an aid to interpreting the treaty at issue. See *infra* notes 85-87 and accompanying text. Reliance on the CAB's adherence to the last official price of gold was justifiable in that CAB statements represent governmental opinion. But see *Martin*, *supra* note 9, at 248 (CAB opinions are not authoritative and should be disregarded by courts dealing with the article 22 gold clause).

²⁴ 690 F.2d at 311-12. The court enforced the article 22 limitation on liability in this case because the decision to decline enforceability was "not clearly foreshadowed." *Id.* at 312 (quoting *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971)). The court relied on *Chevron Oil*, wherein the Supreme Court asserted that a court could consider, as a factor in deciding to apply its decision prospectively only, whether a new principle of law was established by resolution of an issue that was not clearly foreshadowed. *Id.* at 106. Since this was the first case in which a court held the Convention's liability limitation provision unenforceable, the result reached was not anticipated by either party to the action. 690 F.2d at 312; cf. *In re Air Crash Disaster at Warsaw, Poland*, 535 F. Supp. 833, 842 (E.D.N.Y. 1981) (last official price of gold chosen as appropriate standard); *Boehringer Mannheim Diagnostics, Inc. v. Pan Am. World Airways, Inc.*, 531 F. Supp. 344, 349 (S.D. Tex. 1981) (free market price of gold proper referent for conversion purposes).

²⁵ 690 F.2d at 306.

²⁶ *Id.*; see Act of Oct. 19, 1976, Pub. L. No. 94-564, § 6, 90 Stat. 2660.

ing values undermined the Convention's purpose of assuring uniform judgments throughout the member nations.²⁷ Finally, while acknowledging the desirability of the highly stable SDR, the court declined to adopt this standard because its use neither is authorized by nor could in any way be based upon the terms of the Convention.²⁸

Additionally, Judge Winter concluded that selection of a new unit of conversion is essentially a political question,²⁹ the answer to which must be negotiated by the parties to the Convention.³⁰ The court noted that while treaty interpretation is within the subject-matter jurisdiction of federal courts,³¹ the judiciary must be careful not to exceed its authority by engaging in treaty proposal, negotiation and ratification, which are exclusively within the province of the executive and legislative branches of government.³² Accordingly, the Second Circuit panel declined to adopt any standard of conversion and held that the article 22 limitation on liability for loss of cargo is prospectively unenforceable in United States courts.³³

²⁷ 690 F.2d at 310; *see infra* note 83 and accompanying text.

²⁸ 690 F.2d at 310.

²⁹ *Id.* at 311. Political questions, broadly speaking, involve matters that should more properly be left to other branches of government and, thus, are essentially nonjusticiable. *See* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-16, at 72 (1978). The political question doctrine is based primarily on the separation of powers within the federal government, and is considered an aspect of judicial self-restraint. *Baker v. Carr*, 369 U.S. 186, 210 (1962); *see* Comment, *Whether the President May Terminate a Mutual Defense Treaty Without Congressional Approval Under the Constitution Is a Non-Justiciable Political Question*—*Goldwater v. Carter*, 29 *DRAKE L. REV.* 659, 662 (1980); *infra* note 50 and accompanying text.

³⁰ 690 F.2d at 311.

³¹ *Id.* A valid treaty, one that does not conflict with the federal Constitution, is the supreme law of the land, U.S. CONST. art. VI, cl. 2; *see* *Doe v. Braden*, 57 U.S. (16 How.) 635, 657 (1853); *American Trust Co. v. Smyth*, 247 F.2d 149, 152-53 (9th Cir. 1957); *Oregon-Pacific Forest Prod. Corp. v. Welsh Panel Co.*, 248 F. Supp. 903, 910 (D. Or. 1965), and is subject to judicial review much like any other law, *see* U.S. CONST. art. III, § 2, cl. 2; *Ableman v. Booth*, 62 U.S. (21 How.) 506, 520 (1858).

³² 690 F.2d at 311. Treaty proposal and negotiation are exclusive functions of the executive branch, U.S. CONST. art. II, § 2, cl. 2, while ratification of a treaty can only be accomplished with the concurrence of two-thirds of the Senate, *id.*; *see* *Haver v. Yaker*, 76 U.S. (9 Wall.) 32, 35 (1869).

³³ 690 F.2d at 311. The court held that the limitation provision of the Convention, article 22, was unenforceable *in toto*. *Id.* at 304, 306; *see supra* text accompanying notes 11 & 24. The limitation clause of the Convention applies to passenger injury or death, *see* *Warsaw Convention*, *supra* note 1, art. 22(1), 49 Stat. 3019, T.S. No. 876, at 22, 137 L.N.T.S. 25, as well as to loss of or damage to goods and baggage, *see id.*, art. 22(2), 49 Stat. 3019, T.S. No. 876, at 22, 137 L.N.T.S. 25; *infra* note 38 and accompanying text.

The *Franklin Mint* decision marks the first time that a court has refused to enforce the Convention's limitation on liability,³⁴ and, in so refusing, the Second Circuit arguably has modified a treaty that the United States obligated itself to honor.³⁵ It is suggested that this modification, ironically, represents an unwarranted intrusion upon Congress' plenary power to modify or abrogate the United States' commitment to an international agreement.³⁶ This Comment examines the potentially far-reaching implications of the *Franklin Mint* decision and suggests that the Second Circuit could have employed traditional principles of treaty interpretation in order to select an appropriate unit of account. Finally, the Comment advocates judicial adoption of the SDR as a viable solution to the Convention's "gold problem."

POTENTIAL IMPLICATIONS OF *Franklin Mint*

On its face, the *Franklin Mint* holding affects the ceiling of liability for damage to or loss or destruction of baggage or cargo.³⁷ It is submitted, however, that the Second Circuit's decision implicitly removes the ceiling of liability for personal injury and wrongful death actions as well, since the maximum amount recoverable both for cargo loss and for personal injuries is tied to the Poincaré

It is suggested that the court's rationale more closely resembles a proclamation that the intent of the framers has been frustrated due to the demonetization of gold, as opposed to any argument based upon the political question doctrine. Under the principle of *clausula rebus sic stantibus*, a doctrine closely related to the common-law contract principle of frustration of purpose, see A. McNAIR, *THE LAW OF TREATIES* 688 n.1 (1961), a party may suspend or terminate its treaty obligations when circumstances forming the basis of its consent to the treaty no longer exist, see Research in International Law, *Draft Convention on the Law of Treaties*, 29 AM. J. INT'L L. 657, 1096 (1935) (supplemental edition) [hereinafter cited as Harvard Draft Convention]. It appears that the court views the lack of an official price of gold as a fundamental change of circumstances that has frustrated the purpose of the Convention. See 690 F.2d at 311 ("It is . . . clear that neither international nor domestic sources of law specify a unit of account for purposes of the Convention. . . . An essential ingredient of . . . [the] formula [for conversion of judgments] has, as a consequence of international action followed by domestic legislation, ceased to exist"). It should be noted, however, that the only party who has standing to invoke the argument of *clausula rebus sic stantibus* in an international court of justice is one of the signatories to the treaty in question. Harvard Draft Convention, *supra*, at 1096; see Civil Aeronautics Board, Internal Memorandum, Warsaw Convention Liability Limits, Apr. 18, 1980, at 4 [hereinafter cited as CAB Memorandum, Apr. 18, 1980]. See generally 2 C. HYDE, *INTERNATIONAL LAW* 1523-27 (1947).

³⁴ 690 F.2d at 312.

³⁵ *Id.* at 304.

³⁶ See *infra* notes 63-65 and accompanying text.

³⁷ 690 F.2d at 311.

franc.³⁸ Thus, air carriers of the signatory nations seemingly will be subject to unlimited liability in personal injury and wrongful death cases arising out of an airline accident.³⁹

The apparent removal of the limitation on personal injury recovery, it is suggested further, will significantly impact upon the Montreal Agreement,⁴⁰ which sets a \$75,000 limit on an air carrier's liability for personal injury or death resulting from a journey to, from, or with an agreed stopping place in the United States.⁴¹ Article 23 of the Convention states that "[a]ny provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in [the Convention] shall be null and void"⁴² Since the *Franklin Mint* decision lifts the ceiling on liability, it may be argued that the Montreal Agreement's \$75,000 limitation is void under article 23 because it purports to fix a lower limit on personal injury liability than that provided for in the Convention.⁴³

³⁸ See Warsaw Convention, *supra* note 1, art. 22(4), 49 Stat. 3019, T.S. No. 876, at 22, 137 L.N.T.S. 25. The personal injury liability limitations effectively are eradicated by the *Franklin Mint* decision, since the 125,000 gold franc limitation contained in article 22(1) must be converted by reference to a dollar value of gold. See *id.*; *supra* note 4.

³⁹ See *supra* note 38.

⁴⁰ Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Civil Aeronautics Board Agreement No. 18,900, *approved by* Civil Aeronautics Board Order No. E-23680, May 13, 1966, 31 Fed. Reg. 7302 (1966) [hereinafter cited as Montreal Agreement].

⁴¹ Montreal Agreement, *supra* note 40. The Montreal Agreement of 1966 is a contract between the United States and a majority of international air carriers providing for a carrier's absolute liability up to \$75,000. See *In re Air Crash Disaster in Bali, Indonesia*, 462 F. Supp. 1114, 1123-24 (C.D. Cal. 1978), *rev'd on other grounds*, 684 F.2d 1301 (9th Cir. 1982); 1 L. KREINDLER, AVIATION ACCIDENT LAW § 12A.01, at 12A-2 to -3 (1981).

⁴² Warsaw Convention, *supra* note 1, art. 23, 49 Stat. 3020, T.S. No. 876, at 22, 137 L.N.T.S. 27.

⁴³ See *In re Air Crash Disaster at Warsaw, Poland*, 535 F. Supp. 833, 834 (E.D.N.Y. 1982). In *In re Air Crash Disaster*, the plaintiffs brought wrongful death actions against Polskie Linie Lotnicze (LOT), the owner of an aircraft that crashed and caused the death of all persons on board. *Id.* at 834. The defendant, LOT, argued that its liability was limited to \$75,000 per passenger under the Montreal Agreement. *Id.* The plaintiffs contended that the damage limitation should be calculated, under the Convention, using the free market price of gold as the appropriate unit of conversion. *Id.* Since such a calculation would result in a judgment greater than the \$75,000 limitation, the plaintiffs contended that the Montreal Agreement was void under article 23 of the Convention. *Id.* The court held that the Montreal Agreement was inapplicable, since the carrier's ticket specifying the terms of the Montreal Agreement did not meet the type-size requirements. *Id.* at 837-39. The court noted, however, that were it not for this determination, the Montreal Agreement would have been applicable, since the last official price of gold was the appropriate unit of conversion. *Id.* at 839, 844. Conversion by reference to the last official price of gold would result in a judgment lower than that permitted by the Montreal Agreement, and, therefore, the \$75,000 liability

In sum, it would appear that abolition of the monetary restrictions on an air carrier's liability will affect three categories of claims: actions for damages incurred due to destruction or loss of or damage to baggage or goods;⁴⁴ actions for damages for personal injuries or death when the Montreal Agreement is inapplicable, but when the plaintiff is able to obtain jurisdiction in the United States over the defendant airline;⁴⁵ and actions for personal injuries or death that heretofore would have been subject to the liability limitations embodied in the Montreal Agreement.⁴⁶ So dire an

limitation under the Montreal Agreement would control. *Id.* at 844. Furthermore, the Policy Development Division of the CAB noted in a staff memorandum that the Montreal Agreement's \$75,000 limitation improperly conflicts with the liability limitations of the Warsaw Convention whenever the market price of gold exceeds \$320 per ounce. *See* CAB Memorandum, Mar. 18, 1980, *supra* note 3, at 6. At the time this memorandum was issued, the Policy Development Division advocated the use of the free market price of gold to compute an airline's maximum liability. *Id.* at 1. The Policy Development Division, however, expressed uncertainty with respect to the future effect on the Montreal Agreement if the free market price of gold were formally adopted by the CAB, and cautioned that "any order which the staff drafts be coordinated with the Departments of State and Transportation before it is sent to the Board for adoption." *Id.* at 8. In a later memorandum, however, the CAB clarified its position, and now formally advocates use of the last official price of gold as the proper unit of conversion. *See* CAB Memorandum, May 20, 1981, *supra* note 3, at 6. The plaintiffs' argument in *In re Air Crash Disaster* is especially applicable to the *Franklin Mint* situation because the Convention still imposes liability, but without limitation. *See infra* text accompanying note 46.

⁴⁴ *See* 690 F.2d at 304-05.

⁴⁵ *See generally* 1 L. KREINDLER, *supra* note 41, § 11.06, at 11-41 to -51. Article 28 of the Convention specifies four locations within which personal jurisdiction over the defendant may be exercised: the carrier's domicile; its principal place of business; the place where the ticket was purchased; or the place of destination. Warsaw Convention, *supra* note 1, art. 28(1), 49 Stat. 3020, T.S. No. 876, at 23, 137 L.N.T.S. 27, 29; *see* Lowenfeld & Mendelsohn, *supra* note 2, at 522-32; McKenry, *Judicial Jurisdiction Under the Warsaw Convention*, 29 J. AIR L. & COM. 205, 208-16 (1963). An example of a situation in which the liability limitation of the Montreal Agreement would be inapplicable, but in which the plaintiff would still be able to exercise jurisdiction over the defendant airline, would be when the passenger bought his ticket in England for a flight from London to Paris on an airline that had its principal place of business in the United States.

⁴⁶ *E.g.*, *Reed v. Wiser*, 555 F.2d 1079, 1081 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); *Burnett v. Trans World Airlines*, 368 F. Supp. 1152, 1153 (D.N.M. 1973); *Husserl v. Swiss Air Transp. Co.*, 351 F. Supp. 702, 703 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973). The *Franklin Mint* court specifically stated that its holding was limited "solely to the unenforceability of the limits" of the Convention, and that no view was being expressed "as to the severability of those limits from the rest of the Convention." 690 F.2d at 311 n.27. It therefore appears that the Convention remains applicable, except for article 22's limitation on liability. *Id.*; *see* Kreindler, *Judicial Blows to Warsaw Convention*, N.Y.L.J., Nov. 1, 1982, at 1, col. 1 (it is unclear whether the balance of the Convention will be enforceable in the future).

In point of fact, the liability limitation of the Montreal Agreement would have been controlling in the recent case, *In re Aircrash at Kimpo International Airport, Korea*, 558 F.

impact, it is suggested, could have been avoided simply by applying fundamentals of treaty interpretation.

A MATTER OF TREATY INTERPRETATION

In rendering the Convention's liability limitations unenforceable in federal courts,⁴⁷ the Second Circuit concluded that "[s]ubstitution of a new [unit of conversion] is a political question, unfit for judicial resolution."⁴⁸ Although the political question doctrine is poorly defined,⁴⁹ it generally enables the judiciary to avoid deciding an issue that is textually committed by the Constitution to the control of a coordinate branch of government.⁵⁰ When presented with a case involving a political question, the Court typically dismisses the case as nonjusticiable.⁵¹ While the doctrine is

Supp. 72 (C.D. Cal. 1983), had the court not relied heavily on *Franklin Mint* for the proposition that the Convention's limitation on liability was unenforceable. See *id.* at 74.

⁴⁷ 690 F.2d at 311.

⁴⁸ *Id.*

⁴⁹ See Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 599-600 & 600 n.8 (1976). Professor Henkin believes that the political question doctrine is somewhat muddled because courts have not made clear whether the dismissal of a case as nonjusticiable is based on deference to political branches, lack of jurisdiction of the case under the Constitution, applicable statutory decisions, or a party's failure to state a sufficient claim for relief. *Id.* at 600 n.8; see also Tigar, *Judicial Power, The "Political Question Doctrine," and Foreign Relations*, 17 U.C.L.A. L. REV. 1135, 1135-36, 1163 (1970) (there is no such thing as a political question doctrine, only disparate legal rules largely based on deference to political branches).

⁵⁰ *Baker v. Carr*, 369 U.S. 186, 211, 217 (1962); see *Goldwater v. Carter*, 444 U.S. 996, 998 (1979) (Powell, J., concurring); *Powell v. McCormack*, 395 U.S. 486, 518-22 (1969). In addition to textual commitment, the Supreme Court has identified other questions that may be relevant in a political question case, such as whether resolution of the case involves judicially unmanageable standards or whether determination of policy decisions is clearly meant for nonjudicial discretion. 369 U.S. at 217. The *Baker* Court identified six elements that may characterize a political question, one or more of which may be present in a given case:

[A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. See generally Jackson, *The Political Question Doctrine: Where Does it Stand After Powell v. McCormack, O'Brien v. Brown and Gilligan v. Morgan*, 44 U. COLO. L. REV. 477, 477-80, 500-11 (1973) (discussion of the six *Baker* "tests").

⁵¹ *Powell v. McCormack*, 395 U.S. 486, 518 (1969) ("federal courts will not adjudicate political questions"); *Goldwater v. Carter*, 481 F. Supp. 949, 956 (D.D.C.), *rev'd*, 617 F.2d 697 (D.C. Cir.), *vacated mem.*, 444 U.S. 996 (1979) (when a true political question comes

employed rarely by the courts,⁵² it does provide an effective means of maintaining the separation of powers among the three branches of government.⁵³

In *Franklin Mint*, the Second Circuit opined that the case could not be resolved through examination of "ambiguities which may be clarified by reference to underlying purpose or with language which inadequately mirrors the understood intentions of the drafters."⁵⁴ The court therefore concluded that the selection of an alternative unit of conversion actually represented a treaty proposal, negotiation and ratification, all of which are textually committed by the Constitution to the control of the legislative and executive branches.⁵⁵ It is suggested, however, that the selection of an appropriate unit of conversion is not the equivalent of a treaty proposal, negotiation or ratification, but rather, a matter of treaty interpretation which falls squarely within the purview of judicial authority.⁵⁶ An examination of several fundamental principles of

before a court, the case should be dismissed as nonjusticiable); see Comment, *Treaty Termination by the President Without Senate or Congressional Approval: The Case of the Taiwan Treaty*, 33 Sw. L.J. 729, 754 (1979).

⁵² See Note, *Justiciability and Foreign Affairs—The Treaty Termination Power*, 46 Mo. L. Rev. 164, 171 n.38 (1981).

⁵³ *Baker v. Carr*, 369 U.S. 186, 210-11 (1962) ("[t]he nonjusticiability of a political question is primarily a function of the separation of powers"); see Comment, *supra* note 51, at 754. The doctrine of separation of powers is based upon the principle that the exercise of executive, legislative and judicial powers should not rest in one body so that the American citizenry is protected from the arbitrary action of those in political power. C. POST, *THE SUPREME COURT AND POLITICAL QUESTIONS* 12-13 (1936).

⁵⁴ 690 F.2d at 311.

⁵⁵ *Id.* The court did not expressly state that the textual commitment argument was being employed in order to label the issue a political question. Nevertheless, this is the most reasonable inference that may be drawn since the court merely stated that resolution of the issue was "plainly a matter to be negotiated by the parties," and that courts must be careful to "observe the line between treaty interpretation on the one hand and negotiation, proposal and advice and consent and ratification on the other." *Id.*

⁵⁶ The fact that the issue in *Franklin Mint* could have been resolved by a branch of government other than the judiciary would not preclude the court from resolving the case by applying traditional principles of treaty interpretation. Cf. *Goldwater v. Carter*, 444 U.S. 996, 999 (1979) (Powell, J., concurring). In *Goldwater*, the issue was whether a president may terminate a treaty without Senate approval. 481 F. Supp. at 951. The Supreme Court held that the issue presented a political question, and remanded the case to the district court with orders to dismiss the complaint. 444 U.S. at 996. Justice Powell agreed with the Court's judgment, but premised his concurrence on the ground that the case was not ripe for decision. *Id.* at 997 (Powell, J., concurring). A political question, however, was not presented by the case, according to Justice Powell, because, although resolution of the case might be troublesome, the issue simply required the Court to apply traditional principles of interpretation to the Constitution. *Id.* at 999 (Powell, J., concurring). It is suggested that Justice Powell's reasoning may be applied to the *Franklin Mint* decision. The issue involved in the

treaty interpretation provides support for this proposition.

A treaty, in essence, is an agreement or contract between two or more nations or sovereigns.⁵⁷ In construing treaties, as with any other contract,⁵⁸ courts will look to the intent of the parties and the underlying purpose that they sought to achieve.⁵⁹ Indeed, it is a basic tenet of treaty law that treaties must be interpreted broadly in order to effectuate the intentions of the parties.⁶⁰

case could have been resolved either by the signatories to the Convention or by a coordinate branch of government. Nevertheless, since a treaty is the supreme law of the land, and since "[i]t is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), a court obviously may interpret a treaty in order to decide an issue, even if another branch of government also could have resolved the case through international agreement or through domestic legislation. It would appear, therefore, that the authority to resolve the Convention's "gold problem" resides co-extensively in all three branches of government. The court's reliance upon the political question doctrine is misplaced because resolution of the issue in *Franklin Mint* is textually committed not only to the executive and legislative branches of government, but to the judiciary as well.

⁵⁷ *Rainey v. United States*, 232 U.S. 310, 316 (1914); *Charlton v. Kelly*, 229 U.S. 447, 474 (1913); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *United States v. Rauscher*, 119 U.S. 407, 418 (1886); see A. McNAIR, *supra* note 33, at 3-6; Comment, *supra* note 51, at 731-32. Lord McNair has defined a "treaty" as "a written agreement by which two or more States or international organizations create or intend to create a relation between themselves operating within the sphere of international law." *Id.* at 3-4 (footnotes omitted). See generally Harvard Draft Convention, *supra* note 33, at 686-98 (treaty is a formal instrument by which two or more nations establish international relations between themselves).

⁵⁸ *Sullivan v. Kidd*, 254 U.S. 433, 439 (1921); *Rocca v. Thompson*, 223 U.S. 317, 331-32 (1912); *Board of County Comm'rs v. Aerolineas Peruanas, S.A.*, 307 F.2d 802, 806 (5th Cir. 1962), *cert. denied*, 371 U.S. 961 (1963); *Hidalgo County Water Control & Improvement Dist. No. 7 v. Hedrick*, 226 F.2d 1, 7 (5th Cir. 1955), *cert. denied*, 350 U.S. 983 (1956).

⁵⁹ *Maximov v. United States*, 373 U.S. 49, 54-56 (1963); *Factor v. Laubenheimer*, 290 U.S. 276, 293-94 (1933); *Sullivan v. Kidd*, 254 U.S. at 439; *Wright v. Henkel*, 190 U.S. 40, 57 (1903); A. McNAIR, *supra* note 33, at 380-81. Significantly, treaties are to be construed "more liberally than private agreements." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431 (1943).

⁶⁰ *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 10 (1936); *Todok v. Union State Bank*, 281 U.S. 449, 452 (1930); *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928); *Day v. Trans World Airlines, Inc.*, 393 F. Supp. 217, 222 (S.D.N.Y.), *aff'd*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976); *Compagnie Financiere de Suez v. United States*, 492 F.2d 798, 810-11 (Ct. Cl. 1974); see Harvard Draft Convention, *supra* note 33, at 937-38 ("the function of treaty interpretation is to discover and effectuate the purpose which a treaty is intended to serve"). See generally A. McNAIR, *supra* note 33, at 383-92. The Convention, in particular, has been subjected to broad interpretation by the courts. In *Glenn v. Compania Cubana De Aviacion, S.A.*, 102 F. Supp. 631 (S.D. Fla. 1952), for example, the treaty was interpreted to apply to a Cuban airliner even though Cuba did not adhere to the Convention. *Id.* at 633-34. Additionally, in *Block v. Compagnie Nationale Air France*, 229 F. Supp. 801 (N.D. Ga. 1964), *aff'd*, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968), the court held that the Convention governs actions arising from accidents on charter flights. 229 F. Supp. at 809. For other cases requiring interpretation of the Convention, see *Reed v. Wiser*, 555 F.2d 1079, 1083-93 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); *Day v.*

Courts are bound to give effect to the stipulations of a treaty and are not empowered to annul or disregard its provisions unless violative of the Constitution.⁶¹ In short, it is the court's "duty to interpret . . . and administer [treaties] according to [their] terms."⁶² Congress alone possesses the authority to abrogate or modify a treaty through the enactment of a subsequent statute.⁶³ A court, however, may not impute to Congress an intention to abrogate or modify a treaty unless the subsequent statute either expressly abandons the treaty or is absolutely incompatible with the terms of the treaty.⁶⁴ The judiciary therefore must sanction performance of

Trans World Airlines, Inc., 528 F.2d 31, 34-38 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976); *Husserl v. Swiss Air Transp. Co.*, 351 F. Supp. 702, 706-07 (S.D.N.Y. 1972), *aff'd per curiam*, 485 F.2d 1240 (2d Cir. 1973).

⁶¹ *Doe v. Braden*, 57 U.S. (16 How.) 635, 657 (1853); see *In re Air Crash Disaster at Warsaw, Poland*, 535 F. Supp. 833, 843 (E.D.N.Y. 1982) (annulment or disregard of a treaty term constitutes modification, a power solely exercisable by the Senate); *King Features Syndicate, Inc., v. Valley Broadcasting Co.*, 43 F. Supp. 137, 138 (N.D. Tex. 1942) ("[c]ourts have no right to annul or disregard" any provisions of a treaty upon "notions of equity, general convenience, or substantial justice"), *aff'd*, 133 F.2d 127 (5th Cir. 1943); L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 170 (1975). Henkin has summarized the court's power with respect to treaties, stating that "[t]he power to terminate a treaty is a political power: courts do not terminate treaties, though they may interpret political acts or even political silences to determine whether they implied or intended termination." *Id.* (footnote omitted).

⁶² *Doe v. Braden*, 57 U.S. (16 How.) 635, 657 (1853). An interpretation of a treaty that will render the treaty wholly or partially inoperative, or that will defeat the object and purposes of the contracting parties, must be rejected. G. DAVIS, *THE ELEMENTS OF INTERNATIONAL LAW* 246-47 (4th ed. 1915); P. HIGGINS, *HALL'S INTERNATIONAL LAW* § 111, at 390 (8th ed. 1924); T. WOOLSEY, *INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW* § 109, at 186 (1874 & photo. reprint 1981); cf. *Ford v. United States*, 273 U.S. 593, 618 (1927) (narrow construction that would defeat treaty's purpose is to be avoided).

⁶³ See, e.g., *Diggs v. Schultz*, 470 F.2d 461, 465 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973); *Brandon v. S.S. Denton*, 302 F.2d 404, 414 (5th Cir. 1962); *Tag v. Rogers*, 267 F.2d 664, 667-68 (D.C. Cir. 1959); *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957, 973 (S.D.N.Y. 1965), *aff'd*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968). The question whether the President of the United States may abrogate a treaty arose in the case of *Goldwater v. Carter*, 444 U.S. 996 (1979). The case, however, was remanded with orders to dismiss. *Id.* at 996. A plurality, consisting of Chief Justice Burger, Justices Stewart, Rehnquist, and Stevens, held that the issue whether a President may abrogate a treaty without congressional approval was essentially a political question, and, therefore, could not be decided by the Court. *Id.* at 1002-06. Hence, the question has remained unanswered. See Nelson, *The Termination of Treaties and Executive Agreements by the United States: Theory and Practice*, 42 MINN. L. REV. 879, 888-89 (1958); Note, *supra* note 52, at 193-94; Comment, *supra* note 51, at 760-61.

⁶⁴ See *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934); *Johnson v. Browne*, 205 U.S. 309, 321 (1907); *United States v. Lee Yen Tai*, 185 U.S. 213, 222 (1902); *Confederated Salish & Kootenai Tribes v. Namen*, 380 F. Supp. 452, 459 (D. Mont. 1974), *aff'd*, 534 F.2d 1376 (9th Cir.), *cert. denied*, 429 U.S. 929 (1976); *Itzcovitz v. Selective Serv. Local Bd. No. 6*, 301 F. Supp. 168, 181 (S.D.N.Y. 1969). It is

the obligations under a treaty until the treaty has been denounced by the government of the United States.⁶⁵ It is submitted that in the absence of a clear and unequivocal statement by Congress that the United States no longer intended to honor the Warsaw Convention, the *Franklin Mint* court was required to interpret the treaty in such a manner as to carry out the intention of the parties.

Additionally, article 18 of the Vienna Convention⁶⁶ militates in favor of the argument for employing principles of treaty interpretation to select an alternative unit of conversion. Article 18 provides that "[a] state is obliged to refrain from acts which would

uncertain whether the *Franklin Mint* court imputed to Congress an intention to abrogate the Convention. The court stated that "Congress . . . abandoned the unit of conversion specified by the Convention and did not substitute a new one." 690 F.2d at 311. Furthermore, the court stated that "[s]ince use of a fixed amount of gold as the Convention's unit was specifically designed to establish a limitation level at a certain value, [repeal of the official price of gold] must be taken as a statement that the official price no longer reflects that specified value." *Id.* at 309. It is suggested that the court may be implying that Congress' repeal of the official price of gold, which became effective in 1978, *see supra* note 6, manifests a congressional intent to abrogate the Convention. Indeed, the court observed that, "[g]iven the lack of an internationally agreed upon standard of conversion, it might be argued that the Convention has been abrogated." 690 F.2d at 311 n.26. It is ironic that although the court recognized that "it is not the province of courts to declare treaties abrogated," *id.*, it simultaneously annulled article 22 of the Convention.

⁶⁵ *See, e.g.*, *Factor v. Laubenheimer*, 290 U.S. 276, 298 (1933); *Charlton v. Kelly*, 229 U.S. 447, 473-74 (1913). The force of the proposition that courts must sanction performance of treaty obligations until the treaty is denounced by the United States government is strengthened by the converse recognition that the judiciary possesses no power to enforce provisions of a treaty that the other branches of government choose to disregard. *E.g.* *Botiler v. Dominguez*, 130 U.S. 238, 247 (1889); *Whitney v. Robertson*, 124 U.S. 190, 194-95 (1888); *Head Money Cases*, 112 U.S. 580, 598 (1884); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1870).

⁶⁶ Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 8 I.L.M. 679 [hereinafter cited as the Vienna Convention]. Although the Vienna Convention has been signed by the United States, the treaty has not been ratified. Note, *supra* note 52, at 192. Nevertheless, the United States recognizes international law as a part of its domestic law. *Skiriotes v. Florida*, 313 U.S. 69, 72-73 (1941); *The Paquete Habana*, 175 U.S. 677, 700 (1900). This is significant because the Vienna Convention has been cited as a statement of the customary principles of international law. *See, e.g.*, *United States v. Cadena*, 585 F.2d 1252, 1261 (5th Cir. 1978); *United States v. Enger*, 472 F. Supp. 490, 505 (D.N.J. 1978) ("Most of the Vienna Convention is binding as customary law even upon nations that have not ratified it, and many of the treaty articles are declaratory of existing international law; the remaining articles are persuasive as evidence of existing international law"); Garretson, *The Immunities of Representatives of Foreign States*, 41 N.Y.U. L. REV. 67, 68-69 (1966); Rogoff, *The International Legal Obligations of Signatories to an Unratified Treaty*, 32 ME. L. REV. 263, 287-88 (1980). Indeed, the Vienna Convention, on its face, purports to be a codification of customary international law with respect to treaties. Vienna Convention, *supra*, preamble; *see Baxter, Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 275, 291 (1965-1966) (treaty purporting to be codification of customary international law is some evidence of the state of that law).

defeat the object and purpose of a treaty . . . until it shall have made its intention clear not to become a party to the treaty"⁶⁷ In 1975, the United States signed Montreal Protocols Nos. 3 and 4,⁶⁸ which established a new standard, premised upon the SDR, for limiting liability under the Convention.⁶⁹ Faced with the elimination of the official price of gold, the signatories to the protocol clearly intended to preserve the liability limitations of the Convention.⁷⁰ Arguably, however, by removing all limitations on air carrier liability under the Convention, the Second Circuit effectively has defeated the object and purpose of Montreal Protocols Nos. 3 and 4, and, in so doing, has directly violated article 18 of the Vienna Convention.⁷¹ It is apparent, therefore, that the court's annulment of the Convention's limits on liability constituted both an improper modification of the treaty and a direct violation of the Vienna Convention. The Second Circuit seemingly could have avoided these unfortunate results and effectuated the intentions of the signatory nations by interpreting the Convention as sanctioning the use of one of the limits on liability proposed by the litigants.⁷²

⁶⁷ Vienna Convention, *supra* note 66, art. 18(a).

⁶⁸ I.C.A.O. Docs. Nos. 9147, 9148 (1975), [hereinafter cited as Montreal Protocol], reprinted in A. LOWENFELD, *AVIATION LAW: CASES AND MATERIALS* 985-1001 (2d ed. Supp. 1981).

⁶⁹ See Montreal Protocol No. 3, *supra* note 68, art. II; Montreal Protocol No. 4, *supra* note 68, art. VII.

⁷⁰ See 690 F.2d at 306-08; Martin, *supra* note 9, at 249.

⁷¹ See Martin, *supra* note 9, at 249; *supra* notes 68-70 and accompanying text.

⁷² It has been well recognized that the gold problem can be resolved through treaty interpretation. Indeed, the CAB formulated the policy of requiring air carriers to compute the ceiling limit of liability printed on air tariffs by reference to the last official price of gold, since that value, in the CAB's view, produced results most nearly consistent with the purpose of the Convention. CAB Memorandum, May 20, 1981, *supra* note 3, at 6; see *Franklin Mint Corp. v. Trans World Airlines, Inc.*, 525 F. Supp. at 1289. Although the CAB recognizes that use of the last official price of gold is tantamount to "engaging in a legal fiction" since that standard no longer exists, it is significant that their decision was based upon the conclusion that an appropriate method of conversion was necessary to effectuate the Convention's purpose and to prevent the treaty from becoming a nullity in the United States. See CAB Memorandum, May 20, 1981, *supra* note 3, at 6. Other federal courts that have dealt with the gold problem have recognized and expressed the court's duty to interpret the Convention in order to find an appropriate method of translating judgments into United States currency. See 535 F. Supp. at 842-43; 531 F. Supp. at 352-53; 525 F. Supp. at 1289. In *Boehringer*, for example, the court recognized that lack of precedent required "a close reading and interpretation of Article 22 of the Convention," in order to resolve the gold problem. 531 F. Supp. at 352. Similarly, in *In re Air Crash Disaster*, the court experienced difficulty in interpreting the intention of the Convention's drafters so as to select an appropriate method of conversion. 535 F. Supp. at 843-44. Though the merits of the conclusions reached

Despite the United States Senate's recent failure to ratify Montreal Protocols Nos. 3 and 4,⁷³ an action that would have solved the Convention's gold standard dilemma,⁷⁴ the Warsaw Convention has not been denounced by the United States.⁷⁵ Choice of an appropriate unit of account, therefore, remains incumbent upon the courts in order to effectuate the intentions of the signatories.

SELECTING AN APPROPRIATE UNIT OF ACCOUNT THROUGH TREATY INTERPRETATION—THE SPECIAL DRAWING RIGHT

Gold was selected by the signatories to the Convention as the appropriate unit of conversion since, at the time of the treaty's signing in 1929, gold was the common denominator of international transactions.⁷⁶ Indeed, it enabled the framers to effectuate the treaty's express purpose of creating an internationally uniform ceiling on liability.⁷⁷ It is significant to note, therefore, that gold merely represented a means by which to achieve the Convention's purpose, and was not, in and of itself, an essential ingredient of the treaty.⁷⁸ This is evidenced by the subsequent signing of Montreal Protocols Nos. 3 and 4, documents which manifest the signatories' continued intention to limit liability, but which expressly reject the use of gold as the appropriate unit of conversion.⁷⁹ Of the four standards for limiting liability proposed by the litigants in *Franklin Mint*, it is submitted that utilization of the SDR would best provide a uniform ceiling on the liability of air carriers.

Adopted in 1975 by the IMF, the SDR presently occupies gold's former status as a universal exchange value,⁸⁰ and is, in es-

by these courts may be questionable, it is suggested that the fact that the gold problem was recognized as one of treaty interpretation is significant.

⁷³ See 129 CONG. REC. S2279 (daily ed. Mar. 8, 1983); Shribman, *Air Liability Treaty Rejected by Senate*, N.Y. Times, Mar. 9, 1983, at D6, col. 5; *Senate Rejects Treaty Raising Airline Liability*, Wall St. J., Mar. 9, 1983, at 5, col. 1.

⁷⁴ See *supra* text accompanying notes 68-69.

⁷⁵ See TREATY AFFAIRS STAFF, OFFICE OF THE LEGAL ADVISER, U.S. DEP'T OF STATE, PUB. NO. 9285, TREATIES IN FORCE 207-10 (1982).

⁷⁶ See *supra* notes 4-5 and accompanying text.

⁷⁷ See *supra* note 3.

⁷⁸ See *supra* notes 3-5 and accompanying text; see also P. SAMUELSON, ECONOMICS 652 (10th ed. 1979) ("[t]here is nothing sacred about gold. Silver, platinum, lead, or, for that matter paper napkins would do, provided they had convenience for exchange, could not be falsified, and were enough limited in supply to keep the price level from soaring").

⁷⁹ See *supra* notes 68-70 and accompanying text.

⁸⁰ See *supra* note 6.

sence, "paper gold."⁸¹ The SDR provides a stable medium of exchange that remains relatively unaffected by the actions of any particular government.⁸² Accordingly, it is suggested that a standard of liability limitation premised upon the SDR best effectuates the intentions of the signatory nations.⁸³ Indeed, it can be argued that had the SDR existed at the time of the Convention's formation, the signatories would have employed it as the appropriate unit of account.⁸⁴

A fundamental concept of treaty interpretation—examination of the subsequent conduct of the parties—provides additional impetus for the selection of the SDR. An essential provision of the Vienna Convention on the Law of Treaties specifically provides that, in addition to the actual terms of a treaty, "any subsequent agreement between the parties regarding the interpretation of the

⁸¹ See Heller, *supra* note 3, at 96.

⁸² See 690 F.2d at 307; Fitzgerald, *The Four Montreal Protocols to Amend the Warsaw Convention Regime Governing International Carriage by Air*, 42 J. AIR L. & COM. 273, 348 (1976). One reason cited by the *Franklin Mint* court for rejecting the SDR as a unit of conversion was that the SDR is subject to modification or elimination by the IMF. 690 F.2d at 310. The court stated that it lacked authority to adopt a unit of conversion that was "variable at the whim of an international body distinct from the parties to the Convention." *Id.* at 311. It is interesting to note, however, that the value of gold was also subject to modification or elimination by the IMF. See Second Amendment to the International Monetary Fund Articles of Agreement, Apr. 30, 1976, art. V, § 12(c)-(g); art. VIII, § 7, 29 U.S.T. 2203, 2218, 2226, T.I.A.S. No. 8937.

⁸³ See Martin, *supra* note 9, at 249. Comparison of the SDR with the other proposed standards of liability limitation manifests the SDR's superiority. Employment of the last official price of gold would be illogical because it represents a value that specifically has been rejected by Congress. See Act of Oct. 19, 1976, Pub. L. No. 94-564, 90 Stat. 2660 (1976). Since it is a value that no longer exists, any decision to utilize the last official price of gold would be arbitrary. See CAB Memorandum, May 20, 1981, *supra* note 3, at 6. Although the last official price of gold would create uniformity of liability because it represents a fixed value of gold, it is suggested that the SDR's availability makes resort to an arbitrary value unnecessary. The free market price of gold is the least acceptable alternative because, by its very nature, it contravenes the Convention's purpose of providing consistent judgments throughout the member nations. *Id.* at 5. Significantly, the *Boehringer* court, while adopting the free market price of gold, admitted its awareness that "the liability limitations . . . may be unrealistically high . . ." 531 F. Supp. at 353 n.47. The fluctuations of the price of gold from approximately \$160 per ounce in 1974 to over \$800 per ounce by the end of the 1970's is graphic evidence of the mercurial, and hence unsuitable nature of this measure of conversion. See A. LOWENFELD, *supra* note 3, § 6.5, at 7-169. Finally, the current value of the French franc is flawed because it represents, as does the free market price of gold, precisely what the framers were trying to avoid—a currency subject to the fluctuations of a single nation. See 690 F.2d at 310; *supra* note 82.

⁸⁴ See *In re Air Crash Disaster*, 535 F. Supp. at 840-41 (defendant aircraft owner argued that gold was appropriate unit of conversion when Convention was drafted in 1929 because gold was common denominator of currency conversion, and that gold of today is SDR).

treaty or the application of its provisions," must be considered for purposes of treaty interpretation.⁸⁵ Accordingly, the Second Circuit has observed that a treaty cannot be viewed as "frozen in the year of its creation,"⁸⁶ and found the subsequent actions and agreements of the signatories highly revelatory of the appropriate construction to be placed upon a particular provision of the Convention.⁸⁷ Nevertheless, the *Franklin Mint* court declined to endorse

⁸⁵ Vienna Convention, *supra* note 66, art. 31(3)(a); *see supra* note 66.

⁸⁶ *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 35 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976). In *Day*, the court was called upon to decide whether passengers who suffered injuries and death as a result of a terrorist attack while waiting to board an international flight were "embarking" within the meaning of article 17 of the Convention. *Id.* at 32 & n.4. Construing the Convention, the court stated that a treaty should be interpreted in a manner that is consistent with the expectations of the parties. *Id.* at 35. Since the parties' expectations vary over the course of time, the court stated that "[c]onditions and new methods may arise not present at the precise moment of drafting. For a court to view a treaty as frozen in the year of its creation is scarcely more justifiable than to regard the Constitutional clock as forever stopped in 1787." *Id.* The court found that the plaintiffs were "embarking" within the meaning of the Convention, and thus held TWA liable under the terms of the treaty. *Id.* at 32. In reaching this determination, the court stated that its decision furthered the intent of the Convention's drafters since the "Warsaw delegates knew that, in the years to come, civil aviation would change in ways that they could not foresee." *Id.* at 38. The court concluded that the framers desired to create a system of air law that would be flexible enough to accommodate unforeseen changes. *Id.* It is suggested that the *Day* rationale may be analogized to the argument for adopting the SDR as the basic unit of account under the Convention. The fact that the original framers might not have foreseen the eventual changes in the world's economy when they chose gold as the standard of conversion does not necessitate the conclusion that the Convention is so inflexible that it cannot be adapted to the modern economy. *See Eck v. United Arab Airlines*, 360 F.2d 804, 812 (2d Cir. 1966) (treaty language initially chosen may, because of changed conditions, imperfectly manifest the treaty's purpose, thus requiring courts to adopt a practical rather than a literal reading in order to effectuate such purpose); *see also* Harvard Draft Convention, *supra* note 33, at 970 (interpreter's task is to render a construction that will effectuate treaty's purpose under present conditions).

⁸⁷ 528 F.2d at 35-37; *see Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 158 (1934); *Factor v. Laubenheimer*, 290 U.S. 276, 294-95 (1933); *Nielsen v. Johnson*, 279 U.S. 47, 52 (1929); *Husserl v. Swiss Air Transp. Co.*, 351 F. Supp. 702, 707 (S.D.N.Y. 1972), *aff'd per curiam*, 485 F.2d 1240 (2d Cir. 1973); G. DAVIS, *supra* note 62, at 247; T. WOOLSEY, *supra* note 62, § 109, at 186; RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 147(1)(f), at 451 (1965); Harvard Draft Convention, *supra* note 33, at 937, 966-70. In *Husserl v. Swiss Air Transp. Co.*, 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd per curiam*, 485 F.2d 1240 (2d Cir. 1973), the Second Circuit affirmed a district court decision that imposed liability upon the defendant airline for injuries allegedly suffered by the plaintiff as a result of the aircraft's hijacking. 351 F. Supp. at 707. The district court reasoned that although a hijacking was probably not within the contemplation of the framers when the Convention was drafted, *id.* at 706, the subsequent conduct of the parties as embodied in the Montreal Agreement indicated that "sabotage" of an aircraft was meant to be compensable since it was within the meaning of the article 17 term "accident," *id.* at 706. Significantly, the court stated that although the Montreal Agreement was not binding upon the judiciary as a treaty, it could be used as evidence of the subse-

the SDR despite the ample subsequent conduct of the parties militating in favor of its adoption.

Confronted with the difficulty of applying the article 22 liability limitations in the wake of the demonetization of gold, the Convention members drafted Montreal Protocols Nos. 3 and 4,⁸⁸ amendments to the Convention that expressed an air carrier's liability in terms of a specified number of SDR's.⁸⁹ Additionally, several signatories have adopted the SDR, either legislatively or judicially, for purposes of judgment conversions.⁹⁰ The United States'

quent conduct of the parties for purposes of interpretation. *Id.* at 707.

In *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976), the court was asked to resolve the issue whether passengers, who were injured or killed as a result of a terrorist attack on an Athens airport, were "embarking" within the meaning of article 17 of the Convention. 528 F.2d at 32. In reaching the conclusion that the passengers, though only waiting in line at the departure gate, were, in fact, "embarking" within the meaning of article 17, *id.* at 32, the *Day* court looked to the increased liability limitations set forth in the Montreal Agreement and the unratified Guatemala City Protocol as evidence that the subsequent conduct of the parties was indicative of a desire to increase the protection afforded to passengers, *id.* at 36 & n.15. Additionally, the court reasoned that its holding furthered the intentions of the signatories since it was their intention to construct a system of air law that was flexible enough to accommodate changes in circumstances over the course of time. *Id.* at 38.

Finally, in *Reed v. Wiser*, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977), the court was presented with the question whether airline employees were entitled to assert the liability limitations of the Convention as a defense to wrongful death actions. 555 F.2d at 1081. The court held that the Convention's liability limitation provisions did apply to suits against airline employees, since a contrary determination would permit a plaintiff to recover from the carrier, through its employees, damages in excess of the article 22 limitation. *Id.* at 1089. In reaching its conclusion, the court looked to the Hague Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 28, 1955, 478 U.N.T.S. 371 [hereinafter cited as Hague Protocol], an amendment to the Convention that specifically extended the article 22 liability limitation to airline employees, *see* Hague Protocol, *supra*, art. XIV, at 383, as evidence that the Convention's ceiling on liability was meant to embrace suits against airline employees. *See* 555 F.2d at 1084-88. Significantly, the court rejected the argument that the United States' failure to ratify the Hague Protocol was a sufficient basis upon which to exclude the amendment from consideration. *Id.* at 1086.

⁸⁸ *See* 1 L. KREINDLER, *supra* note 41, § 12B.02[10], at 12B-28 to -29; A. LOWENFELD, *supra* note 3, § 6.5, at 7-171; Fitzgerald, *supra* note 82, at 323-30. The Montreal Conference, attended by 66 nations, convened mainly in order to revise the cargo provisions of the Convention. Fitzgerald, *supra* note 82, at 348. Ultimately, however, it drafted four protocols, the third of which, Montreal Protocol No. 3, altered the Convention's unit of conversion from the French gold franc to the SDR. *Id.* at 330. Significantly, the United States provided the impetus for the adoption of the SDR. *See id.* at 323-27.

⁸⁹ Montreal Protocol No. 3, *supra* note 68, art. II; Montreal Protocol No. 4, *supra* note 68, art. VII. Montreal Protocol No. 3 provides for a liability limitation of 100,000 SDR's (\$117,000) for passenger injury or death and 17 SDR's (\$20) per kilogram of damaged or lost cargo. Montreal Protocol No. 3, *supra* note 68, art. II.

⁹⁰ As noted by the *Franklin Mint* court, four members of the Convention, Great Brit-

intention to replace gold with the SDR, as that intention is embodied in Montreal Protocols Nos. 3 and 4 may be asserted notwithstanding the Senate's failure to ratify the protocols.⁹¹ Although Montreal Protocols Nos. 3 and 4 did not receive the two-thirds Senate majority required for ratification,⁹² the protocols did receive a simple majority, falling only twelve votes short of ratification.⁹³ Additionally, some of the Senators who voted against ratification did so for reasons other than dissatisfaction with imposing liability limitations.⁹⁴ Coupled with majority support of limited liability in the Senate are several other factors that indicate the

ain, Sweden, the Netherlands, and Italy, adopted the SDR for purposes of the Convention either by judicial decision or by statute. See 690 F.2d at 308 & nn. 14-15.

⁹¹ See *supra* note 73 and accompanying text. In *Reed v. Wiser*, 555 F.2d at 1086, the Second Circuit reversed the district court holding that the liability limitations of the Convention did not apply to airline employees. *Id.* at 1081. In reaching its conclusion, the district court relied on the Senate's failure to ratify the Hague Protocol, an amendment to the Convention which contained a provision extending the Convention's limited liability to an airline's agents and employees, as evidence that limited liability was not meant to so extend. *Reed v. Wiser*, 414 F. Supp. 863, 868 (S.D.N.Y. 1976), *rev'd*, 555 F.2d 1079 (2d Cir.), *cert. denied*, 411 U.S. 931 (1977). The Second Circuit viewed the lower court's reliance on the Senate's failure to ratify the Hague Protocol as "misplaced, since the refusal to ratify the Protocol was due to the United States' dissatisfaction with an entirely different aspect of the Protocol—its failure to provide a sufficient increase in the liability limits—rather than to its express application of these limits to a carrier's employees." 555 F.2d at 1086. It is submitted that the Second Circuit's reasoning in *Reed* illustrates that the Senate's failure to ratify Montreal Protocol Nos. 3 and 4 is not necessarily inimical to or inconsistent with judicial selection of the SDR. See *infra* notes 92-97 and accompanying text.

⁹² See U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur . . .").

⁹³ See Ex. B, 95-1, 98th Cong., 1st Sess., 129 CONG. REC. S2279 (daily ed. Mar. 8, 1983). Fifty Senators voted in favor of ratification, 42 against; 7 Senators did not vote, with one answering "present." *Id.*

⁹⁴ See 129 CONG. REC. S2278 (daily ed. Mar. 8, 1983) (statements of Sen. Lautenberg and Sen. Biden). Part of Senator Lautenberg's opposition to the protocols stemmed from his belief that the protocols did not reduce the high costs of litigation borne by plaintiffs and defendants, a goal, the Senator maintained, the protocols were designed to achieve. *Id.* Senator Lautenberg's primary opposition to the protocols, however, was based not on the imposition of a limit on liability, but on his perception that the limit selected was arbitrary and bore "little or no relation to the actual damages of each injured person, or the type of conduct of the airline." *Id.* Senator Biden was opposed to ratification primarily because the protocols would remove the wilful misconduct exception of the Convention that exposes an airline to unlimited liability. *Id.*; see Warsaw Convention, *supra* note 1, art. 25(1) (carrier not permitted to assert Convention's limitation of liability as defense when damage is caused by carrier's wilful misconduct). Senator Biden believed that if the wilful misconduct exception were removed, in effect imposing liability without fault, incidents of airline misconduct might go unexamined, thus "reduc[ing] the incentive for airlines to be safety conscious." 129 CONG. REC. S2278 (daily ed. Mar. 8, 1983) (statement of Sen. Biden).

United States' intention to adopt the liability limitations contained in the protocols: the Executive Branch of the United States and the Departments of State and Transportation support the protocols,⁹⁵ the United States itself proposed incorporation of the SDR into the Convention's formula for judgment conversion,⁹⁶ and the Senate Foreign Relations Committee voted in favor of ratification sixteen to one.⁹⁷

Clearly, the protocols and the actions of these signatories manifest an intention on the part of the member nations to eliminate gold as a unit of conversion and to substitute a standard of liability premised upon the SDR.⁹⁸ It thus is suggested that in eradicating all limitations on liability under the Convention, the *Franklin Mint* court has neglected to give effect to the signatories' intentions, has failed to consider the conduct of the parties subsequent to the signing of the Convention, and has improperly nullified a provision of a treaty to which the United States is a party. The more prudent course of action, it is submitted, would have been to replace the Poincaré franc with the SDR as the basic unit of account under the Convention.

One question, however, remains. Because, unlike gold, the SDR cannot be used to convert the Convention's existing unit of account,⁹⁹ the Poincaré franc, into any national currency, the court must establish the quantity of SDR's that will comprise the new standard. While at first glance this may appear to be treaty modification, a closer inspection demonstrates that it is simply a matter of treaty interpretation. Montreal Protocol No. 3 establishes that an air carrier's liability may not exceed 17 SDR's for damage to cargo and 100,000 SDR's for personal injuries.¹⁰⁰ Rather than judicial imposition of an arbitrary and speculative number of SDR's, adoption of these specific limitations can be premised upon the application of traditional principles of treaty interpretation.¹⁰¹ As a

⁹⁵ 129 CONG. REC. S2237-38 (daily ed. Mar. 7, 1983) (letters of Warren Christopher, George P. Schultz and James A. Baker III).

⁹⁶ Fitzgerald, *supra* note 82, at 325.

⁹⁷ 129 CONG. REC. S2237 (daily ed. Mar. 7, 1983) (letter of Gerald R. Ford).

⁹⁸ See *supra* notes 88-90 and accompanying text.

⁹⁹ See *supra* note 9.

¹⁰⁰ Montreal Protocol No. 3, *supra* note 68, art. II.

¹⁰¹ See *Day v. Trans World Airlines, Inc.*, 528 F.2d at 35-36. The *Day* court, in commenting upon the use of subsequent conduct as a vehicle to discern the intent of the parties, stated that such an examination is not an imposition of the court's values upon the parties, but merely represented the court's "respect [for,] and implement[ation] of the goals and

document embodying the subsequent actions of the parties to the Warsaw treaty, Montreal Protocol No. 3 provides authority for selecting the SDR standards specified therein as the proper limitations on liability.¹⁰²

CONCLUSION

In rendering the liability limitation for cargo damage or loss unenforceable, the *Franklin Mint* court arguably has modified a treaty of the United States. Although the elimination of the official price of gold posed a serious dilemma, the Second Circuit's apparent infringement upon the powers of the executive and legislative branches of government was neither warranted nor necessary. By relying upon traditional principles of treaty interpretation, the court could have formulated a new standard of liability based upon the SDR. It is urged that, in the future, courts embrace the concept of the SDR so as to enable the United States to continue its adherence to the Warsaw treaty until the Convention is amended further to include a workable standard of liability.

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intentions of the parties." *Id.* at 36 n.13.

¹⁰² See Vienna Convention, *supra* note 66, art. 31(3)(a), at 692. For a discussion of cases in which courts have examined the signatories' subsequent agreements as a method of treaty interpretation, see *supra* note 87.